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No. 03-7434 ORIGINAL

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

Supreme Court, U.S.
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DANIEL BENITEZ, *Petitioner*

v.

ROBERT A. WALLIS, *Respondent.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN S. MILLS
Counsel of Record
TRACY S. CARLIN
REBECCA BOWEN CREED
Mills & Carlin, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
Counsel for Petitioner

QUESTIONS PRESENTED

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court interpreted 8 U.S.C. § 1231(a)(6) to authorize the detention of an alien subject to a removal order, but only for a reasonable period of time until it can be determined whether there is a country to which the alien can be removed. Although § 1231(a)(6) applies to both admitted and non-admitted aliens, the Court emphasized that the aliens at issue in *Zadvydas* had been lawfully admitted and that non-admitted aliens "would present a very different question." This case raises two, independent questions about the applicability of § 1231(a)(6) to non-admitted aliens:

I. Whether the same language in § 1231(a)(6), which does not distinguish in its application between admitted and non-admitted aliens, may be interpreted differently for non-admitted aliens than for admitted aliens;

and, if not,

II. Whether interpreting § 1231(a)(6) to authorize the indefinite detention of a non-admitted alien would raise a constitutional question sufficient to warrant interpreting the statute to avoid the question.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

1. Daniel Benitez, Petitioner.

2. Robert Wallis, in his capacity as Director Immigration and Naturalization Services, Respondent.

3. United States (real party in interest as Respondent).

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SUPREME COURT OF THE UNITED STATES
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DANIEL BENITEZ, *Petitioner*

v.

ROBERT A. WALLIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-26a) is reported at 337 F.3d 1289. Neither the opinion of the United States District Court for the Northern District of Florida (App., *infra*, 27a-31a) nor the recommended order of the United States Magistrate Judge (App., *infra*, 32a-37a) are reported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion on July 17, 2003. (App. , *infra*, 1a-26a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in relevant part, "No person shall be . . . deprived of . . . liberty . . . without due process of law."

2. Section 241(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6) (2001), provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT

Petitioner, Daniel Benitez, is a Cuban citizen who came to the United States in 1980 from the port of Mariel, Cuba. (App. , *infra*, 2a.) He was paroled into the United States, pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(d)(5) (1980), but has never been formally admitted into the country. (App. , *infra*, 2a.)

In 1983, Mr. Benitez was convicted of second-degree grand theft and was convicted again ten years later of armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful

possession, sale or delivery of a firearm with an altered or removed serial number. (App. A, *infra*, 4a.)

While he was serving his state prison sentence for the 1993 convictions, the Immigration and Naturalization Service ("INS") revoked Mr. Benitez's parole pursuant to 8 C.F.R. § 212.5(d)(2). (App., *infra*, 4a.) In 1994, the INS found Mr. Benitez to be excludable and ordered his deportation due to his criminal convictions. (App., *infra*, 4a.)

In 2001, Mr. Benitez was released from his Florida prison sentence into INS custody. (App., *infra*, 5a.) After neither being removed from the United States nor released, Mr. Benitez filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of Florida. (App., *infra*, 6a.) At no point in these proceedings has the Respondent suggested that Mr. Benitez could be returned to Cuba or removed to any other country in the reasonably foreseeable future. (App., *infra*, 8a n. 12.)

In his § 2241 petition, Mr. Benitez contended that he was being detained unlawfully. (App., *infra*, 7a.) The Respondent justified Mr. Benitez's detention pursuant to section 241(a)(6) of the INA, 8 U.S.C. § 1231(a)(6) (2001) (as amended). (App., *infra*, 8a-9a n.13.)

Consistent with a recommended order of the magistrate judge (App., *infra*, 32a-37a), the district court denied Mr. Benitez's § 2241 petition. (App., *infra*, 27a-

31a.) Mr. Benitez appealed the decision to the United States Court of Appeals for the Eleventh Circuit. On July 17, 2003, the Eleventh Circuit issued a detailed opinion affirming the district court's decision. (App., *infra*, 1a-31a.)

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to review the Eleventh Circuit's decision because that decision conflicts with decisions of other circuit courts of appeals on two important questions regarding the indefinite detention of Mariel Cubans and other non-admitted aliens that the United States is unable to remove. First, in light of this Court's recent determination that § 1231(a)(6) does not authorize indefinite detention of admitted aliens, can this provision be interpreted to authorize the indefinite detention of non-admitted aliens even though the statute itself makes no distinction between admitted and non-admitted aliens? Second, if the statute can be interpreted differently, does the indefinite detention of a non-admitted alien raise a serious constitutional question? To understand the nature of these two circuit splits, one must first understand the relevant statute and this Court's recent opinion interpreting it.

I. UNDER THIS COURT'S DECISION IN *ZADVYDAS V. DAVIS*, 8 U.S.C. § 1231(A)(6) DOES NOT AUTHORIZE THE GOVERNMENT TO DETAIN ADMITTED ALIENS INDEFINITELY.

This case depends on the proper interpretation of the following statutory language:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to the terms of supervision in paragraph (3).

§ 241(a)(6) of the INA, 8 U.S.C. § 1231(a)(6) (2001) (emphasis added). The parties agree that Mr. Benitez is inadmissible under 8 U.S.C. § 1182 and that the ninety-day removal period provided in 8 U.S.C. § 1231(a) has expired. The sole question is whether the language "may be detained beyond the removal period" authorizes indefinite detention or detention only for a reasonable period of time to determine whether removal may be effected.

This Court adopted the latter interpretation in *Zadvydas v. Davis*, 533 U.S. 678 (2002). In that case, the Court held that an interpretation of § 1231(a)(6) to allow indefinite detention "would raise a serious constitutional problem." *Id* at 690. The Court noted that the government may detain a person consistent with the Due Process Clause of the Fifth Amendment only "in a criminal proceeding with adequate procedural protections" or "in certain special and 'narrow' nonpunitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.' " *Id.* (citations omitted)).

The Court recognized and rejected two potential special justifications offered by the Government in support of indefinite detention of aliens: (1) ensuring that the alien will appear once removal is possible and (2) preventing danger to the community. *Id.* The Court held that the flight-risk justification was "weak or nonexistent" in cases where there is no reasonable likelihood that the alien's country will accept him back. *Id.* The Court rejected the second justification because it was not sufficiently narrow. *Id.* at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (citations omitted)).

Although the Court acknowledged that there are administrative proceedings available to allow release where the alien "bears the burden of proving he is not dangerous," it suggested that "greater procedural protections" may be required. *Id.* at 692. The Court concluded:

> The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious.

Id.

The Court also rejected the Government's argument that "from a constitutional perspective, alien status itself can justify indefinite detention" under

the Court's earlier decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) ("*Mezei*"). *Id.* It noted that the parties had briefed the issue of whether "subsequent developments have undermined *Mezei*'s legal authority," *id.* at 694, but it declined to address this issue because *Mezei* was distinguishable. *Id.* at 693.

The distinction was based on the "entry fiction" that has been developed in immigration law. *See id.* at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *see generally* Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 Harv. L. Rev. 1868, 1871-74 (2003). Generally speaking, an alien who has entered the United States, legally or illegally, obtains a level of protection by the United States Constitution while he is in the country. *See Zadvydas*, 533 at 693. (noting that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") Such aliens are sometimes referred to as "deportable" or "admitted" aliens.

However, when the Government intercepts an alien attempting to enter the United States and detains him without formally admitting him, the alien is deemed to have never entered the country, even if he is paroled into the country pending his repatriation. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-190 (1958)

(holding that an alien "paroled" into the United States pending admissibility had not effected an "entry"); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (holding that even if present in the United States for several years, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"). These aliens are sometimes referred to as "excludable" or "non-admitted." Non-admitted aliens, though lawfully present in the country, do not have the same constitutional protections as an admitted alien. *See Mezei*, 345 U.S. at 212 ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' ")

The petitioner in *Mezei* had once been legally admitted into the United States, but he had left the country losing his status as an admitted alien. *Id.* at 692. When he returned, the Government denied him admission and took him into custody indefinitely. *Id.* The *Mezei* court held that this indefinite detention did not violate the Constitution. *Id.*

The *Zadvydas* Court noted that the status of the aliens in *Zadvydas* was an important distinction that rendered *Mezei* inapplicable:

> We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.

Id. at 682; *see also id.* at 693 (referring to this as a difference "in a critical respect" between *Zadvydas* and *Mezei*). Thus, because the aliens in *Zadvydas* had been admitted into the United States, the Court did not need to consider whether *Mezei* remains good law.

The Court ultimately concluded that an admitted "alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Id.* at 696. It therefore turned to the issue of whether Congress had clearly intended for § 1231(a)(6) to authorize indefinite detention. After reviewing the language of the statute, provisions of similar statutes, and the history of immigration law in the United States, the Court was unable to find "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed." *Id.* at 697-99.

Based on this analysis, the Court concluded that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. Thus, it held that "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

Since this Court's opinion in *Zadvydas*, the lower courts have struggled with the question of whether a different result should obtain for aliens who have never been admitted. The Sixth and Ninth Circuits have held that a non-admitted alien may not be detained indefinitely pursuant to § 1231(a)(6). *See Rosales-Garcia v. Holland*, 322 F.3d 386, 408 (6th Cir. 2003) (*en banc*), *cert. denied*, __ U.S. __, 123 S. Ct. 2607 (U.S. 2003) (No. 02-1464); *Xi v. I.N.S.*, 298 F.3d 832, 837-39 (9th Cir. 2002); *see also* Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 Harv. L. Rev. 1868 (2003) (canvassing cases and concluding that *Zadvydas* should govern non-admitted aliens); Edward B. Cole, *What Difference Does It Make Whether You Are Deportable or Excludable? The Supreme Court Refuses To Say*, 28 N.C. J. Int'l L. & Com. Reg. 567, 603 (2003) (same).

In the decision below, the Eleventh Circuit joined the Fifth, Seventh, and Eighth Circuits in holding to the contrary. *See Borrero v. Aljets*, 325 F.3d 1003, 1007 (8th Cir. 2003); *Rios v. I.N.S.*, 324 F.3d 296, 297 (5th Cir. 2003); *Hoyte-Mesa v. Ashcroft*, 272 F.3d 989, 991 (7th Cir. 2001), *cert. denied*, __ U.S. __, 123 S. Ct. 185 (2002).

II. THE CIRCUITS ARE SPLIT ON WHETHER THIS COURT'S INTERPRETATION OF 8 U.S.C. § 1231(A)(6) APPLIES TO NON-ADMITTED ALIENS.

The primary issue argued below was whether this Court's interpretation of § 1231 in *Zadvydas* controls. Consistent with the holdings of the Sixth and Ninth Circuits, Mr. Benitez contended that § 1231(a)(6) cannot have one interpretation for admitted aliens and a different interpretation for non-admitted aliens. In rejecting this argument, the Eleventh Circuit created an even two-two circuit split by joining the Eighth Circuit regarding the interpretation of this statute.

A. The Sixth and Ninth Circuits hold that § 1231(a)(6) should be applied to non-admitted aliens in the same manner as admitted aliens.

In a six-three *en banc* decision earlier this year, the Sixth Circuit joined the Ninth Circuit in holding that the meaning of the language in § 1231(a)(6) can have but one meaning and that is the interpretation reached by this Court in *Zadvydas*:

> On the basis of the plain language of the provision, we find it difficult to believe that the Supreme Court in *Zadvydas* could interpret § 1231(a)(6) as containing a reasonable limitation for aliens who are removable on grounds of deportability but not for aliens who are removable on grounds of inadmissibility. Section 1231(a)(6) itself does not draw any distinction between the categories of removable aliens; nor would there be any statutory reason to interpret "detained beyond the removal period" differently for aliens who are removable on grounds of inadmissibility and aliens who are removable on grounds of deportability. *See Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) (discussing presumption that a statutory term retains the same meaning throughout a statute and in particular throughout a provision).

Rosales-Garcia, 322 F.3d at 404-05; *accord Xi*, 298 F.3d at 836 ("The statute, on its face, makes no exceptions for inadmissible aliens. The Supreme Court's

unqualified holding provides that the statute 'does not permit indefinite detention.' "); *see also Borrero v. Alljets*, 325 F.3d 1003, 1009 (8th Cir. 2003) (Henry, J., dissenting) ("[T]here is no credible distinction to be made between the rights conferred to removable and inadmissible aliens in § 1231(a)(6)."); *Borrero v. Alljets*, 178 F. Supp. 2d 1034, 1042 (D. Minn. 2001) ("[W]e can find no sound reason to interpret and apply the statute one way for one category of aliens, but a different way for others."), *rev'd*, 325 F.3d 1003 (8th Cir. 2003).

The Ninth Circuit noted the possibility that this Court might have reached a different interpretation if § 1231(a)(6) only applied to non-admitted aliens, but it concluded that this has no bearing on the issue:

> The government has offered no authority suggesting that a litigant may not take advantage of a statutory interpretation that was guided by the principle of constitutional avoidance when that litigant's case does not present the constitutional problem that prompted the statutory interpretation.

Xi, 298 F.3d at 839; *see also Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) ("It simply cannot be that the meaning [of a statute] will change depending on the background or pedigree of the petitioner. Were we to so hold, we would render the meaning of any statute as changeable as the currents of the sea, and potentially as cruel and capricious.").

The Sixth and Ninth Circuits also looked to the following language in Justice Kennedy's dissenting opinion (joined by Chief Justice Rehnquist and

Justices Scalia and Thomas) in *Zadvydas* to determine that this Court had considered the implications of its decision to non-admitted aliens:

> The majority's unanchored interpretation ignores another indication that the Attorney General's detention discretion was not limited to [the removal] period. Section 1231(a)(6) permits continued detention not only of removable aliens but also of inadmissible aliens, for instance, those stopped at the border before entry. Congress provides for detention of both categories within the same statutory grant of authority. Accepting the majority's interpretation, then, there are two possibilities, neither of which is sustainable. On the one hand, it may be that the majority's rule applies to both categories of aliens .... On the other hand, the majority's logic might be that inadmissible and removable aliens can be treated differently. *Yet it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility.*

Zadvydas, 533 U.S. at 710 (Kennedy, J., dissenting) (emphasis added), *quoted in Rosales-Garcia*, 322 F.3d at 408 n.27, *and Xi*, 298 F.3d at 836-37; *see also Zadvydas*, 533 U.S. at 705 (Scalia, J., dissenting) ("Congress undoubtedly thought that both groups of aliens – inadmissible aliens at the threshold and criminal aliens under final order of removal – could be constitutionally detained on the same terms, since it provided the authority to detain both groups in the very same statutory provision, see § 1231(a)(6).").

Thus, the Sixth and Ninth Circuits hold that the same language in § 1231(a)(6) cannot be interpreted one way for admitted aliens and another way for non-admitted aliens. As a result, they have refused to limit this Court's holding in *Zadvydas* to admitted aliens.

B. The Eleventh Circuit joined the Eighth Circuit in holding that § 1231(a)(6) may be interpreted differently for non-admitted aliens.

The Eleventh Circuit joined the Eighth Circuit in rejecting Justice Kennedy's proposition that the text of § 1231(a)(6) does not admit of the possibility that it can be interpreted differently for non-admitted and admitted aliens.[1] The Eleventh and Eighth Circuits hold that the *Zadvydas* majority's interpretation of § 1231(a)(6) only applies to aliens formally admitted into the United States.

The Eighth Circuit reached this conclusion with less than a paragraph of analysis:

> Borrero argues that when the Supreme Court narrowly construes a statute to avoid constitutional doubt, that construction applies categorically to all future cases whether or not the circumstances raise the same constitutional questions. Although *Xi v. INS* and *Rosales-Garcia v. Holland*, take this view, we respectfully disagree. We interpret *Zadvydas* as limiting the detention of only those aliens whose detention raises serious constitutional doubt – admitted aliens. *Zadvydas* itself does not mandate uniform application of § 1231(a)(6) to all aliens. Noting that § 1231(a)(6) applies to "terrorists and criminals," the Court stated that "terrorism or other special circumstances" may justify greater deference to Congress and the Executive. In light of the fact that *Zadvydas* expressly distinguished *Mezei* on the grounds that Mezei had not made an entry into the United States, we conclude that *Zadvydas* 's six-month presumption of reasonableness is inapplicable to inadmissible aliens.

Borrero, 325 F.3d at 1007 (citations omitted).

In the opinion below, the Eleventh Circuit adopted this rationale, but went on to analyze the statutory argument in much more detail than did the Eighth Circuit. The court found five additional considerations supporting its decision.

First, it characterized *Zadvydas* as "an as-applied constitutional challenge" that left the statutory scheme "intact with respect to inadmissible aliens who never have been admitted into the United States." (App., *infra*, 22a.) Second, it held, "When a statute has different applications, it is not necessary to say that it is categorically infirm; it is only the constitutionally problematic aspects which are subject to the construction that avoids the problem." (App., *infra*, 23a (quoting *Xi*, 298 F.3d at 841 (Rymer, J., dissenting)).) Third, the court feared that applying *Zadvydas* to non-admitted aliens would "create an unprotected spot in this country's defense of its borders" because the government might "not be able to determine what potential dangers a particular unadmitted alien might pose." (App., *infra*, 23a-24a.) Fourth, the court believed that this Court limited *Zadvydas* to admitted aliens to retain the Attorney General's discretion in the context of non-admitted aliens. (App., *infra*, 24a-25a.) Finally, the court found that the legislative history behind § 1231(a)(6) precluded an interpretation that the Attorney General's

[1] Although the Fifth and Seventh Circuits have held that non-admitted aliens may be detained indefinitely without offending the Constitution, the Eleventh Circuit correctly observed that neither of these courts addressed the statutory argument. (App., *infra*, 20a.) As discussed *infra*, the Fifth and Seventh Circuit only addressed the constitutional issue.

discretion to detain a non-admitted alien indefinitely had been restricted. (App., *infra*, 25a-26a.)

Thus, four circuits have now considered Mr. Benitez's argument regarding the interpretation of § 1231(a)(6), as applied to non-admitted aliens. They have split evenly, creating a solid basis for review by this Court.

III. THE CIRCUITS ARE SPLIT ON WHETHER THE INDEFINITE DETENTION OF A NON-ADMITTED ALIEN RAISES A SUFFICIENT QUESTION UNDER THE DUE PROCESS CLAUSE TO WARRANT INTERPRETING 8 U.S.C. § 1231(A)(6) AS NOT ALLOWING FOR THE INDEFINITE DETENTION OF NON-ADMITTED ALIENS.

Even if the same words in a statute could be interpreted to mean one thing for admitted aliens and another for non-admitted aliens, that only begs the question of whether the statute in this case, § 1231(a)(6), *should* be interpreted differently for non-admitted aliens. Specifically, does the indefinite detention of a non-admitted alien raise a sufficiently serious constitutional question to warrant an interpretation that avoids the question? Again, the circuits are split.

A. The Sixth Circuit holds that the indefinite detention of non-admitted aliens is sufficiently suspect to justify the same interpretation of § 1231(a)(6) that this Court reached for admitted aliens.

In *Rosales-Garcia*, the *en banc* Sixth Circuit held that the indefinite detention of a non-admitted alien would raise serious constitutional doubts. The Court began by recognizing that any alien physically in this country, even if never formally admitted, is protected to some extent by the Due Process Clause, which by its plain language applies to "all persons." *Rosales-Garcia*, 322 F.3d at 409 (citing *Mathews v. Diaz*, 426 U.S. 67, 75 n.7, 77 (1976) (holding that Cuban aliens paroled pursuant to § 1182(d)(5) are entitled to constitutional protection), and *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.")). Thus, the court reasoned, "While we respect the historic tradition of the 'entry fiction,' we do not believe it applies to deprive aliens living in the United States of their status as 'persons' for the purposes of constitutional due process." *Id.* at 409.

The Sixth Circuit went on to conclude that under this Court's precedents, non-admitted aliens are entitled to less *procedural* due process, but not less *substantive* due process than admitted aliens. *Id.* at 409 & n.28 (citing *Zadvydas*,

533 U.S. at 704 (Scalia, J., dissenting) and *Landon v. Palencia*, 459 U.S. 21, 32 (1982)). The court reasoned:

> The fact that excludable aliens are entitled to less process, however, does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. If excludable aliens were not protected by even the substantive component of constitutional due process, as the government appears to argue, we do not see why the United States government could not torture or summarily execute them. Because we do not believe that our Constitution could permit persons living in the United States – whether they can be admitted for permanent residence or not – to be subjected to *any* government action without limit, we conclude that government treatment of excludable aliens *must* implicate the Due Process Clause of the Fifth Amendment.

Rosales-Garcia, 322 F.3d at 410; *see also Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within the United States to humane treatment." (footnote omitted))

The Sixth Circuit, therefore, found that the dispositive question is whether a person's interest in not being detained indefinitely implicates a substantive due process right or a procedural one. *Rosales-Garcia*, 322 F.3d at 410-11 (developing this dichotomy with respect to indefinite detention). In answering this question, the court focused on the following language from *Zadvydas*:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections or, in special and "narrow" nonpunitive "circumstances" where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint."

Zadvydas, 533 U.S. at 690 (citations omitted)

The Sixth Circuit interpreted this language to mean that "government detention violates a person's substantive due process rights unless such detention is" the result of criminal proceedings or the "narrow nonpunitive circumstances" referenced in *Zadvydas*. *Rosales-Garcia*, 322 F.3d at 411.

The court specifically found that *Mezei* is no longer good law to the extent it supports the indefinite detention of a non-admitted alien:

> [W]e believe that the Court's implicit conclusion in *Mezei* is eclipsed by the conclusion drawn from the *Salerno* line of cases that the indefinite detention of excludable aliens does raise constitutional concerns. All of the cases that the *Zadvydas* Court relied on in assessing the constitutional due process concerns implicated by the indefinite detention of aliens who are removable on grounds of deportability were decided after *Mezei*. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Jackson v. Indiana*, 406 U.S. 715 (1972). In these cases, the contours of constitutionally permissible civil detention are rigorously delineated – a substantial jurisprudential development from the time that *Mezei* was decided. As we explained above, the *Zadvydas* Court held on the

> basis of these cases that civil detention is constitutionally permissible only "in certain special and narrow non-punitive circumstances where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690. As we also explained above, we do not believe that any such special circumstances outweigh [the non-admitted petitioners'] interest in avoiding indefinite and potentially permanent INS detention. Although we must – as a lower federal court – apply all pertinent Supreme Court precedent, it is not our role to reconcile cases whose application leads to opposite conclusions. Therefore, to the extent that we could conclude, in reliance on the Court's holding in *Mezei*, that the indefinite detention of excludable aliens is constitutionally permissible, we believe such a conclusion to be fatally undermined by the Court's later decisions in the *Salerno* line of cases.

Rosales-Garcia, 322 F.3d at 414-15 (footnote omitted).

The court also held that *Mezei* was distinguishable on its facts because "the *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security." *Rosales-Garcia*, 322 F.3d at 413-14.

The Sixth Circuit ultimately held that it is at least a serious question whether the Constitution permits the government to lock a non-admitted alien in prison for the rest of his life because his home country will not take him back. Therefore, it applied the avoidance doctrine invoked in *Zadvydas* to hold that § 1231(a)(6) must be interpreted to allow continued detention only for so long as is reasonable to attempt to effect removal.

B. The Eleventh Circuit joined the Fifth, Seventh, and Eighth Circuits in holding that the indefinite detention of a non-admitted alien does not raise a serious constitutional question.

The Eleventh Circuit, on the other hand, found that the indefinite detention of a non-admitted alien raises no constitutional questions because, it concluded, *Mezei* was controlling. (App., *infra*, 17a-19a.) In so holding, the court joined the Fifth, Seventh and Eighth Circuits in applying *Mezei*. *See Borrero*, 325 F.3d at 1007-08; *Rios*, 324 F.3d at 297; *Hoyte-Mesa*, 272 F.3d at 991.[2] These courts declined to distinguish *Mezei* and concluded that, in the absence of more clear direction from this Court, they were bound by *Mezei*.

As this Court noted in *Zadvydas*, there is substantial debate as to the continuing validity and correctness of *Mezei*, especially in light of this Court's recent jurisprudence regarding the substantive due process right to be free from indefinite detention. The Court left this important question for another day in *Zadvydas* because that case was readily distinguishable. The subsequent circuit court decisions have now framed this important issue of constitutional law for this Court's consideration.

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[2] The Ninth Circuit declined to address the constitutional issue in *Xi* and rested its decision on the statutory issue. *Xi*, 298 F.3d at 840 (Gould, J., concurring).

IV. THE COURT SHOULD TAKE REVIEW OF THIS CASE TO RESOLVE THE CIRCUIT SPLITS.

The legality of the indefinite detention of non-admitted aliens literally affects thousands of people in this country. In its Petition for a Writ of Certiorari in *Rosales-Garcia*, the Government reported that the Bureau of Immigration and Customs Enforcements of the Department of Homeland Security (formerly, the INS) is detaining over 2000 non-admitted aliens. More than half of these aliens, including over 900 Mariel Cubans, have been detained for more than six months. (*See* Pet. for Cert., Case No. 02-1464, at 27-28.) The Government shuttles these detainees from prison to prison, often across circuit lines. For example, Mr. Benitez has been transferred from Florida in the Eleventh Circuit, where he was detained at the time he filed his petition for a writ of habeas corpus, to Indiana in the Seventh Circuit.

Not only do the issues in this case affect thousands of people, the effect on their lives is profound. They face the very real possibility of spending the rest of their lives incarcerated, not because of any crimes they may have committed, but because their countries will not take them back. Whether they have a right to be released under strict supervision or must suffer a life sentence depends, at the moment, on where they are detained. Thus, non-admitted aliens in Los Angeles, San Diego, Phoenix, Detroit, and Cleveland, for example, may not be detained

indefinitely, while those in Miami, Atlanta, Houston, New Orleans, Chicago, St. Louis, and Minneapolis are subject to indefinite detention at the whim of the Government.

If the splits are not resolved, they will likely have a substantial impact on the distribution of non-admitted aliens throughout the United States. Those who are not being detained have a strong incentive to reside in the Sixth or Ninth Circuits. The Government, on the other hand, will have an incentive to imprison detainees in states in the Fifth, Seventh, Eighth and Eleventh Circuits and move incarcerated detainees from the Sixth and Ninth Circuits. The states, who often house the detainees in state prisons under contract with the United States, should not have to bear such disparate burdens.

While this Court denied certiorari to review *Rosales-Garcia*, the split on the main issue – the proper interpretation of § 1231(a)(6) – was not developed at the time. While the Sixth and Ninth Circuits had developed their statutory analysis in favor of applying *Zadvydas* to non-admitted aliens, only the Eighth Circuit had engaged in the statutory analysis and reached a contrary result, and that court's analysis covered only a single paragraph. Now that the Eleventh Circuit has provided a detailed statutory analysis limiting *Zadvydas* to admitted aliens, further decisions by the remaining courts of appeals are unlikely to plow new ground.

Indeed, the eighteen federal appellate judges who have considered the issue are equally divided at nine to nine.[3]

Moreover, this issue of statutory interpretation raises implications far beyond immigration law. Other than the dissenting opinion of Judge Rymer in *Xi*, the Eleventh Circuit cited no authority for the proposition that the same language of a statute may be construed one way to avoid a constitutional question regarding one class of persons, but be construed in the opposite way for persons who do not raise the same question. *But cf. Chmakov*, 266 F.3d at 215 (rejecting this proposition in interpreting another statute and characterizing the proposition as "cruel and capricious").

Finally, it is important to note that there have never been any allegations that Mr. Benitez has had any involvement in terrorism or foreign conflict. The detention of aliens who are suspected of terrorism or who have been designated as "enemy combatants" is not an issue in this case. As this Court noted in *Zadvydas*, such cases may provide additional justifications for detention not present in cases such as this. 533 U.S. at 691 ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected

[3] Six circuit judges in *Rosales-Garcia*, two in *Xi*, and one in *Borrero* voted in favor of applying this Court's interpretation of § 1231(a)(6) in *Zadvydas* to non-admitted aliens. The three Eleventh Circuit judges below joined three in *Rosales-Garcia*, two in *Borrero*, and one in *Xi* in interpreting § 1231(a)(6) differently for non-admitted aliens.

terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (citations omitted)). Thus, any need for the law to develop in the circuit courts regarding post-September 11 detention issues does not in any way militate against the need for immediate review of Mr. Benitez's continued imprisonment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted so the Court can resolve these two important issues on which the circuits are split.

Respectfully Submitted,

JOHN S. MILLS
Counsel of Record
TRACY S. CARLIN
REBECCA BOWEN CREED
Mills & Carlin, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075

Counsel for Petitioner

OCTOBER, 2003

APPENDICES

A. Opinion of United States Court of Appeals for the Eleventh Circuit (July 17, 2003) 1a

B. Opinion of United States District Court for the Northern District of Florida (June 11, 2002) 27a

C. Report and Recommendation of United States Magistrate Judge (April 8, 2003) 32a

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 17, 2003
THOMAS K. KAHN
CLERK

No. 02-14324

D. C. Docket No. 02-00019-CV-5-19-MMP

DANIEL BENITEZ,

Petitioner-Appellant,

versus

ROBERT WALLIS, Director INS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(July 17, 2003)

Before DUBINA, BLACK and HULL, Circuit Judges.

PER CURIAM:

Daniel Benitez, a native and citizen of Cuba, is an inadmissible alien who brought this § 2241 petition challenging his indefinite detention. The district court concluded that the INS's determinations that Benitez posed a danger to the community and was likely to engage in further violent behavior were facially

legitimate and bona fide reasons to detain Benitez until removal to Cuba is possible. Consequently, the district court denied Benitez's § 2241 petition. After review and oral argument, we affirm.

I. BACKGROUND

In 1980, Daniel Benitez attempted entry into the United States from the port of Mariel, Cuba and, in effect, was stopped at the border.[1] Benitez then was paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA"). See 8 U.S.C. § 1182(d)(5). Under § 1182(d)(5), the Attorney General may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5).

In 1983, Benitez was convicted in Dade County, Florida, of second degree grand theft, see Fla. Stat. § 812.014, and was sentenced to three years' probation.

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[1]Over the past twenty-five years,

> Castro has unleashed massive waves of refugees on the United States to release the pressure of internal dissent. In the Mariel boat-lift of 1980, Castro let some 125,000 Cubans flee to the United States. Many of these refugees were dissidents, criminals or mental patients. In the summer of 1994, facing increasing hostility to his regime and open defiance of the Communist Party, Castro allowed over 50,000 refugees to flee to the United States on make-shift rafts. After the exodus of 1994, Castro threatened to unleash another wave of refugees in the spring of 1995 in an effort to discourage passage of the Helms-Burton Act . . . .

C. Todd Piczak, The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Doctrine, 61 U. Pitt. L. Rev 287, 312-13 (Fall 1999).

Sometime thereafter, Benitez submitted an application to adjust his status to that of a lawful permanent resident. Under applicable immigration laws, Cuban refugees may apply for permanent resident status once they: (1) have been paroled into the United States; (2) have been physically present in the United States for one year; and (3) are eligible to receive an immigrant visa and are admissible to the United States for permanent residence. See 8 U.S.C. § 1255.[2]

Under the provisions of § 212(a) of the INA, certain classes of aliens are ineligible to receive an immigrant visa and are not admissible to the United States for permanent residence, and thus fail to meet the third condition outlined above. See 8 U.S.C. § 1182(a). One such class includes "[a]liens who have been convicted of a crime involving moral turpitude." 8 U.S.C. § 1182(a)(9) (1983). In 1985, Benitez's application for permanent resident status was denied because his criminal conviction for grand theft was a crime involving moral turpitude.[3]

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[2]Section one of the Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended 8 U.S.C. § 1255, historical and statutory notes, provides:

> That, notwithstanding the provisions of Section 245(c) of the Immigration and Nationality Act, ... the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

[3]A second application for adjustment of status filed by Benitez was denied in 1990 for lack of prosecution.

In 1993, Benitez pled guilty to a multi-count criminal indictment in Florida state court. Specifically, Benitez pled guilty to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale or delivery of a firearm with an altered or removed serial number. The state court sentenced Benitez to 20 years' imprisonment.

Based on his 1993 criminal convictions in Florida, the INS determined that Benitez's continued immigration parole was against the public interest. Pursuant to 8 C.F.R. § 212.5(d)(2), the INS revoked Benitez's immigration parole.[4]

Benitez then was ordered to appear before an immigration judge "to determine whether he should be excluded and deported." The notice informed Benitez that he had a right to counsel and to have a friend or relative present at the hearing. In 1994, Benitez was found excludable and deportable to Cuba because of his criminal convictions in Florida.[5]

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[4]According to § 212.5(d)(2), "when in the opinion of the district director in charge of the area in which the alien is located neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status which he or she had at the time of parole." 8 C.F.R. § 212.5(d)(2) (1993).

[5]In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). See Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 (1996). IIRIRA made comprehensive changes to the Immigration and Nationality Act (INA), including changes in immigration terminology. See generally Assa'ad v. United States Atty. Gen., 332 F.3d 1321, 1326-27 (11th Cir. 2003). Previously, individuals who were ineligible for admission to the United States were referred to as "excludable," while those who had gained admission were referred to as "deportable." See 8 U.S.C. §§ 1182, 1251 (1994). Excludable aliens are now referred to as "inadmissible" aliens. See 8 U.S.C. § 1182. Additionally, the amended INA now uses the term "removal proceedings" to refer to the proceedings applicable to both inadmissible and deportable aliens. See 8 U.S.C. § 1229a. For the purposes of this opinion, we use the terms excludable, inadmissable, and unadmitted interchangeably. We do so not to suggest that these terms under immigration laws will always have the exact same legal meaning, but rather because these terms as applied to Benitez are without any substantive difference. Benitez is excludable under the prior version of the INA, inadmissable under IIRIRA, and his immigration parole never constituted a formal admission or entry into the United States.

On October 11, 2001, Benitez was released into INS custody. Benitez's status then was reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody.[6] On November 6, 2001, Benitez appeared before the Cuban Review Panel.[7]

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[6]Before the Cuban Review Panel makes a recommendation that a detainee be granted parole, a majority of the Panel must conclude that: "(i) The detainee is presently a nonviolent person; (ii) The detainee is likely to remain nonviolent; (iii) The detainee is not likely to pose a threat to the community following his release; and (iv) The detainee is not likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(2).

The panel also must consider the following factors when determining whether to recommend further detention or release on parole of a detainee: "(i) The nature and number of disciplinary infractions or incident reports received while in custody; (ii) The detainee's past history of criminal behavior; (iii) Any psychiatric and psychological reports pertaining to the detainee's mental health; (iv) Institutional progress relating to participation in work, educational and vocational programs; (v) His ties to the United States, such as the number of close relatives residing lawfully here; (vi) The likelihood that he may abscond, such as from any sponsorship program; and (vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(3).

[7]According to § 212.12(d)(1),

> The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a

On January 11, 2002, Benitez filed this § 2241 petition challenging his indefinite detention by the INS. On January 17, 2002, Benitez received a Notice of Releaseability, in which a Cuban Review Panel concluded that Benitez was releaseable under the criteria established by the Cuban Review Plan at such time as the INS determined that a suitable sponsorship to a half-way house could be arranged.[8] See 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.12 (2002) (Parole determinations and revocations respecting Mariel Cubans). On March 10, 2003, Benitez's Notice of Releaseability was revoked because the INS concluded, without a hearing, that Benitez was involved in a planned jail escape. See 8 C.F.R. § 212.12(e).[9] Therefore, Benitez's current detention results not only from his inadmissible alien status, but also from his violations of the conditions of his earlier immigration parole and the INS's determination that he has not refrained from criminal conduct while in custody.[10]

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three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.
8 C.F.R. § 212.12(d)(1).

[8]Although the Notice was served/delivered on January 17, 2002, it is dated December 13, 2001.

[9]Benitez disputes his involvement in the planned jail escape. This issue, however, is not before this Court.

[10]Mariel Cubans who are being detained have their cases reviewed every year to determine whether they should be paroled. See 8 C.F.R. § 212.12(g)(2). There is no claim on appeal before this Court that Benitez has not received annual consideration for immigration parole in accordance with the Cuban Review Plan. Inadmissable aliens other than Mariel Cubans are considered for parole under similar procedures. See 8 C.F.R. § 241.4.

Benitez, proceeding pro se before the district court, asserted that his indefinite detention was unconstitutional in light of the Supreme Court's decision in Zadvydas v. Davis, 533 U.S. 678 (2001). According to the district court, the fact that Benitez was a "non-admitted parolee" made Zadvydas inapplicable because Zadvydas limited its holding to resident aliens. The district court concluded that the INS reasonably determined that Benitez was a danger to the community and was likely to engage in future criminal conduct. The district court further concluded that these determinations warranted Benitez's detention until he could be removed to Cuba. Finding no constitutional or statutory prohibition against Benitez's indefinite detention, the district court denied Benitez's § 2241 petition. Benitez timely appealed, and this Court, in its discretion, appointed counsel to represent Benitez on appeal.

II. DISCUSSION

Benitez does not challenge the fact that he (1) attempted to enter illegally the United States, (2) never formally has been admitted into this country, and (3) is properly subject to removal. Instead, Benitez filed his § 2241 petition arguing only that his indefinite detention is impermissible given the Supreme Court's

decision in Zadvydas.[11] On appeal, Benitez asserts that his indefinite detention violates both the United States Constitution and federal law.[12]

The INS continues to detain Benitez pursuant to 8 U.S.C. § 1231(a)(6). Thus, we first discuss § 1231(a)(6) and how the Supreme Court interpreted § 1231(a)(6) in Zadvydas. We then analyze the legal issues presented in Benitez's appeal.

A. 8 U.S.C. § 1231(a)(6)

After an alien, such as Benitez, is ordered removed from the United States, the Attorney General must attempt to secure the alien's removal within 90 days. See 8 U.S.C. § 1231(a)(1) (the "removal period").[13] "Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible . . . ." 8 U.S.C. § 1231(a)(2). Congress, however, recognized that securing an alien's actual removal within 90 days is not always possible. Consequently, § 1231(a)(6) expressly authorizes the Attorney General to detain aliens beyond the 90-day removal period, as follows:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable [for violations of nonimmigrant status or entry conditions, violations of criminal laws, or threatening national security] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

B. Zadvydas

In Zadvydas, the Supreme Court expressly addressed whether the government's authority under § 1231(a)(6) to detain two legal permanent residents beyond the 90-day removal period allowed the government to detain them indefinitely. The two legal permanent residents were ordered removed based on

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[11]The Supreme Court has determined that habeas jurisdiction under § 2241 for cases involving aliens was not repealed by ADEPA or IIRIRA. See INS v. St. Cyr, 533 U.S. 289, 314 (2001); see also Zadvydas, 533 U.S. at 688 (concluding that "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention").

[12]The government does not contend that repatriation by Cuba of Benitez is reasonably foreseeable. Thus, we accept Benitez's claim that he, at present, is subject to indefinite detention.

[13]In its response brief on appeal, the government asserts that pre-IIRIRA rules govern Benitez's indefinite detention. However, in the district court proceedings, the government relied on IIRIRA, did not assert that pre-IIRIRA rules applied, and did not dispute (in any way) the district court's application of IIRIRA. Therefore, the issue of whether IIRIRA applies to Benitez's claims has been waived by the government in this particular case. See Onishea v. Hopper, 171 F.3d 1289, 1305 (11th Cir. 1999) (en banc); Depree v. Thomas, 946 F.2d 784, 793 (11th Cir. 1991). Consequently, we apply IIRIRA to this case, but note that IIRIRA's application in Benitez's case is not free from doubt because the deportation proceedings against Benitez commenced in 1993 and Benitez's final deportation order was entered in 1994, both events well prior to IIRIRA. See Rosales-Garc[illegible] v. Holland, 322 F.3d 386, 401-03 (6th Cir. 2003) (en banc) (discussing which statute to apply), cert. denied, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); cf Akinwale v. Ashcroft, 287 F.3d 1050, 1052 n.2 (11th Cir. 2002) (applying IIRIRA to an indefinite detention claim where deportation proceedings commenced in 1995, prior to IIRIRA, but the final order of deportation was entered on October 3, 1997, after IIRIRA); see also Alanis-Bustamante v. Reno, 201 F.3d 1303, 1306-07 (11th Cir. 2000) (discussing how Congress divided deportation proceedings into three categories). Thus, we expressly do not address whether Benitez's indefinite detention claims in his § 2241 petition should be tied to his 1994 deportation order and governed by pre-IIRIRA law or whether IIRIRA applies because Benitez is not challenging his 1994 deportation order but only the length of his detention pursuant to that order.

criminal convictions. The government, however, could not effectuate their removal because no country would accept them.

Specifically, Kestutis Zadvydas was a legal permanent resident alien of Lithuanian decent, who was born in a displaced persons camp in Germany in 1948. Zadvydas, 533 U.S. at 684. Zadvydas had a long criminal history and also a long history of flight, both in his criminal proceedings and his deportation proceedings. Id. In 1992, Zadvydas was convicted of possession with intent to distribute cocaine and was sentenced to 16 years' imprisonment in state prison. Id. After only two years' imprisonment, he was released into INS custody and ordered deported to Germany. Id.

Germany, however, refused to accept Zadvydas because he was not a German citizen. Id. Next, the INS attempted to deport Zadvydas to Lithuania. Id. Lithuania refused to accept Zadvydas because he was not a citizen or a permanent resident of Lithuania. Id. The INS also tried unsuccessfully to deport Zadvydas to the Dominican Republic (Zadvydas's wife's country). Id.[14]

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[14]The district court ordered Zadvydas released under supervision because it believed that "the Government would never succeed in its efforts to remove Zadvydas from the United States, leading to his permanent confinement, contrary to the Constitution." Zadvydas, 533 U.S. at 685. The Fifth Circuit reversed, concluding "that Zadvydas' detention did not violate the Constitution because eventual deportation was not 'impossible,' good-faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review." Id.; see also Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999).

In Zadvydas, the Supreme Court also considered the case of Kim Ho Ma. Id. at 685. Ma was born in Cambodia, but fled to the United States at an early age. Id. In 1995, Ma was convicted of manslaughter and was sentenced to 38 months' imprisonment. Id. After two years' imprisonment, he was released into INS custody and ordered removed. Id. The United States, however, has no repatriation treaty with Cambodia. Id. at 686. Having no place to send Ma, the INS kept him in custody because "it was unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release." Id. at 685-86 (internal quotation marks omitted).[15]

In evaluating indefinite detention in Zadvydas, the Supreme Court considered whether indefinite detention of resident aliens, if authorized by § 1231(a)(6) as the government contended, would present constitutional problems. The Supreme Court acknowledged that the two resident alien petitioners in Zadvydas enjoyed certain constitutional privileges associated with individuals who have gained entry into the United States. Id. at 693.

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[15]In the district court, more than one hundred habeas corpus petitioners, like Ma, challenged their ongoing detention by the INS. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. The five-judge panel determined that the Constitution forbids post-removal detention unless there is a realistic chance that the alien will be deported. The panel further concluded that because there was no repatriation agreement with Cambodia, there was no realistic chance that Ma and the others would be deported. A single judge then applied this ruling to Ma and held that he should be released. The Ninth Circuit affirmed Ma's release for essentially the same reasons as outlined by the panel of five judges. See Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).

In Zadvydas, the Supreme Court also explained that Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), permits the indefinite detention of unadmitted aliens whom the government is unable to return anywhere else, but noted that Mezei "differs from the present cases [in Zadvydas] in a critical respect." Zadvydas, 533 U.S. at 693. The critical difference is that the alien in Mezei was "treated, for constitutional purposes, as if stopped at the border." Zadvydas, 533 U.S. at 693 (internal citations omitted). According to the Supreme Court in Zadvydas, "that made all the difference" in its earlier decision that Mezei's indefinite detention did not violate the Constitution. Id.

In Zadvydas, the Supreme Court further stressed that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." 533 U.S. at 693. The Supreme Court also emphasized that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." Id. (citations omitted). "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Id. (citations omitted).

After an extended discussion of the serious constitutional problems of permitting the indefinite detention of legal permanent residents as opposed to unadmitted aliens, the Supreme Court in Zadvydas saved § 1231(a)(6) from unconstitutionality in the context of a resident alien by limiting the post-removal-period detention to a length of time reasonably necessary to bring about the actual removal of the resident alien. Id. at 694-99. The Supreme Court then recognized six months as a presumptively reasonable time of post-removal-period detention for resident aliens. Id. at 699-702.

C. Circuit Split Post-Zadvydas

A circuit split has developed as to whether Zadvydas limits only the government's authority to detain resident aliens or whether Zadvydas applies to all categories of aliens. Compare Borrero v. Aljets, 325 F.3d 1003, 1007 (8th Cir. 2003) (concluding "that Zadvydas's six-month presumption of reasonableness is inapplicable to inadmissible aliens"); Rios v. I.N.S., 324 F.3d 296, 297 (5th Cir. 2003) (concluding that Zadvydas "distinguished the status of deportable aliens from that of excludable aliens"); Hoyte-Mesa v. Ashcroft, 272 F.3d 989, 991 (7th Cir. 2001) (concluding that an inadmissible alien's "continued detention does not violate due process"), cert. denied, 123 S. Ct. 185 (2002); with Rosales-Garcia v. Holland, 322 F.3d 386, 408 (6th Cir. 2003) (en banc) (applying the reasonableness limitation that the Supreme Court read into § 1231(a)(6) in Zadvydas to

inadmissible aliens), cert. denied, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); Xi v. I.N.S., 298 F.3d 832, 837-39 (9th Cir. 2002) (same).[16] Although a circuit split exists, the Supreme Court has denied certiorari in cases representing both viewpoints.

This case, however, requires us to join the debate and determine whether unadmitted aliens, post-Zadvydas, may be detained indefinitely under § 1231(a)(6). To do so, we first discuss why Benitez remains an inadmissable alien and then whether inadmissible aliens have a constitutional right to be free from indefinite detention. We then examine whether the reasonableness component, as read into § 1231(a)(6) by the Supreme Court in Zadvydas, applies to inadmissible aliens.

D. Benitez Is an Inadmissible Alien

Because the status of the alien affects the issues herein, we begin by confirming Benitez's alien status. Although Benitez has been present physically

[16]The Sixth Circuit decision in Rosales was the result of an interesting procedural history. The district court denied the petitioner's § 2241 petition. The Sixth Circuit reversed the district court on January 31, 2001, and concluded that the indefinite detention of inadmissible aliens violates the Fifth Amendment. Following Zadvydas, the government petitioned the Supreme Court for certiorari, requesting that the Sixth Circuit's decision be vacated and remanded in light of Zadvydas. The Supreme Court granted the government's motion and vacated and remanded the case for reconsideration in light of Zadvydas. The Sixth Circuit then heard the case on remand en banc and concluded that the Supreme Court's interpretation of § 1231(a)(6) applied to all classes of aliens. The Supreme Court then denied certiorari.

in the United States for more than 20 years, we readily conclude that Benitez never formally has been admitted and remains an inadmissable alien.

As mentioned above, Benitez arrived in the United States as part of the Mariel boat-lift, was stopped at the border, and paroled into this country. He was paroled because Congress has recognized that it is often necessary to permit arriving aliens, such as Benitez, to make a temporary, unofficial entry into the United States pending the resolution of their applications. See Mezei, 345 U.S. at 215; see also 8 U.S.C. § 1225(b) (alien who does not appear to examining immigration officer to be entitled to land may be detained for further inquiry); 8 U.S.C. § 1182(d)(5)(A) (granting authority to the Attorney General to parole aliens seeking admission into the United States, but providing that parole does not constitute an admission of the alien). Furthermore, the Supreme Court has rejected claims that the parole or detention of an unadmitted alien has any effect on the alien's status under the law. See Leng May Ma v. Barber, 357 U.S. 185, 188 (1958).[17] Because an alien's legal status is not altered by detention or parole, it is clear that Benitez is, and remains, an inadmissable alien and is similar to any

[17]In Leng May Ma, the Supreme Court noted that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." 357 U.S. at 188. Likewise, the Supreme Court explained that "[t]he parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status . . . ." Id. at 190; see also Mezei, 345 U.S. at 215 (alien permitted to enter pending a decision on admissibility "is treated as if stopped at the border"). This principle has become known as the "entry doctrine" fiction.

other alien who has not gained entry and is stopped at this country's border. See Jean v. Nelson, 727 F.2d 957, 969-70 (11th Cir. 1984) (en banc).

Any discussion of Benitez's rights in the immigration context must also start with the fundamental difference in the legal status of (1) unadmitted aliens and (2) resident aliens who have effected "entry" into the United States, whether illegally or legally. This critical difference not only was recognized in Zadvydas, but has been a hallmark of immigration law for more than a hundred years. For example, in Leng May Ma, the Supreme Court emphasized that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." 357 U.S. at 187. The Supreme Court continued that "[i]n the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" Id. (quoting Mezei, 345 U.S. at 212).

The Supreme Court further has explained that aliens seeking admission, such as Benitez, have no constitutional rights regarding their applications for admission. See Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[A]n alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative . . . . [H]owever, once an alien gains admission to our country and

begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953) ("'excludable' aliens . . . are not within the protection of the Fifth Amendment"); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores.").

E. Constitutional Analysis

Against this background, we now examine whether, post-Zadvydas, the indefinite detention of an inadmissable alien, like Benitez, violates the Constitution. As mentioned above, the Supreme Court in Mezei expressly addressed the government's authority to detain indefinitely unadmitted aliens. Mezei had lived in the United States for approximately 25 years. 345 U.S. at 208. He left the United States in 1948, without authorization or reentry papers, and resided in Hungary for 19 months. Id. He then attempted to return to the United States. Id. The United States refused to admit Mezei into the country, and he was detained indefinitely on Ellis Island.

Because Mezei had voluntarily left the country, the Supreme Court had "no difficulty in holding respondent an entrant alien or 'assimilated to [that] status' for constitutional purposes." Mezei, 345 U.S. at 214 (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 599 (1953)). The Supreme Court also stated that:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Mezei, 345 U.S. at 212 (internal citations and quotation marks omitted). The Supreme Court concluded that the unadmitted alien's continued, even indefinite, detention did not deprive him of any statutory or constitutional rights. Id. at 215.

This Court, sitting en banc, also has addressed the constitutional rights of inadmissible aliens in the context of indefinite detention. In Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), this Court considered a group of Haitian aliens who were inadmissible and were being detained at various INS facilities pending a final determination of the merits of their individual asylum claims. After noting "the fundamental distinction between the legal status of excludable or unadmitted aliens and aliens who have succeeded in effecting an 'entry' into the United States," this Court concluded that "[a]liens seeking admission to the United States . . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress." Jean, 727 F.2d at 967-68.

This Court then addressed the concerns of the critics of a policy or legal system that allowed for the indefinite detention of aliens. In Jean, this Court noted that

> [s]ome courts and commentators have suggested that when an exercise of the government's power to exclude results in an indefinite detention of an excludable alien, at some point the continued imprisonment becomes punishment, regardless of the legal justifications or fictions involved. These authorities contend that at this juncture the government should be required to make some justification to continue to detain the alien.

Id. at 974. The Jean Court concluded "that we must resist the temptation to tamper with the authority of the Executive by ruling that excludable aliens have constitutional rights [against indefinite detention], even with regard to their applications for parole." Id. at 975.

The Jean decision is based on Mezei. Although Mezei has been criticized heavily by academic commentators, it remains good law. As mentioned above, Mezei is distinguished and preserved, but is not overruled, in Zadvydas. See Zadvydas, 533 U.S. at 693-94. As Mezei remains valid precedent, so does Jean. Consequently, we conclude that inadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention. See, e.g., Borrero, 325 F.3d at 1007-08; Rios, 324 F.3d at 297; Hoyte-Mesa, 272 F.3d at 991.

F. Statutory Right under § 1231(a)(6)

Although Benitez does not have a constitutional right precluding indefinite detention, we also must consider whether he has a statutory right under § 1231(a)(6), post-Zadvydas, prohibiting indefinite detention. As previously mentioned, a circuit split has developed as to the breadth of Zadvydas's holding.

The Fifth, Seventh, and Eighth Circuits have concluded that Zadvydas does not affect the government's long-standing authority to detain indefinitely unadmitted aliens. Although three circuits have so concluded, the Fifth Circuit in Rios and the Seventh Circuit in Hoyte-Mesa do not engage in any statutory analysis of how § 1231(a)(6) must be read after Zadvydas. Rather, they simply conclude that Zadvydas did not overrule Mezei and, therefore indefinite detention of unadmitted aliens is permissible. This conclusion, however, begs the separate question of statutory construction and whether the Supreme Court's interpretation of § 1231(a)(6) in Zadvydas must now apply uniformly to all types of aliens.

The Eighth Circuit in Borrero specifically does address the statutory issue of whether the Zadvydas Court's statutory construction of § 1231(a)(6) as containing a "reasonableness" component must apply categorically to all aliens, regardless of the alien's legal status. Borrero, 325 F.3d at 1005-07. The Eighth Circuit concluded that Zadvydas's narrowing construction of § 1231(a)(6) does not limit the government's statutory authority to detain unadmitted aliens "[b]ecause the detention of unadmitted aliens does not raise the same constitutional concerns as does the detention of admitted aliens." Id. at 1005. The Eighth Circuit stressed that "[t]he constitutional issue avoided in Zadvydas is simply not present in the context of aliens who have not effected an entry into the United States." Id. at 1007.

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In doing so, the Eighth Circuit expressly rejected alien Borrero's argument that the same statutory construction of § 1231(a)(6) must apply "categorically to all future cases whether or not the circumstances raise the same constitutional questions." Borrero, 325 F.3d at 1007. The Eighth Circuit acknowledged that the Ninth and the Sixth Circuits have taken the view that the same construction must apply, but the Eighth Circuit disagreed for several reasons. Id.

First, the Eighth Circuit "interpret[ed] Zadvydas as limiting the detention of only those aliens whose detention raises serious constitutional doubt – admitted aliens." Borrero, 325 F.3d at 1007. Second, the Eighth Circuit emphasized that "Zadvydas itself does not mandate uniform application of § 1231(a)(6) to all aliens." Id. The Eighth Circuit reached this conclusion based, in part, on the Supreme Court's notation that "'terrorism or other special circumstances' may justify greater deference to Congress and the Executive." Id. (quoting Zadvydas, 533 U.S. at 697). Third, the Eighth Circuit stressed how Zadvydas "expressly distinguished Mezei on the grounds that Mezei had not made an entry into the United States." Borrero, 325 F.3d at 1007. Based on these reasons, the Eighth Circuit concluded that "Zadvydas's six-month presumption of reasonableness is inapplicable to inadmissable aliens." Id.

We find the Eighth Circuit's reasoning persuasive and interpret Zadvydas as limiting the detention period of only those aliens whose continued confinement

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raises serious constitutional doubt, i.e., resident aliens who have effected entry. See id.; Xi, 298 F.3d at 841-42 (9th Cir. 2002) (Rymer, J., dissenting). But see Rosales-Garcia, 322 F.3d at 408; Xi, 298 F.3d at 837-39. In addition to the rationale given by the Eighth Circuit in Borrero, we adopt this view for several other reasons.

First, Zadvydas reads like an as-applied constitutional challenge where the Supreme Court repeatedly stated that its holding would not necessarily apply to other situations. As previously stated, Zadvydas opens with the statement that "[a]liens who have not gained initial admission to this country would present a very different question." Zadvydas, 533 U.S. at 682. Because Zadvydas was qualified in so many respects and reads like an as-applied decision, we conclude that the Supreme Court left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States.

Second, as does the dissent in the Ninth Circuit's Xi decision, we "take the Supreme Court at its word: while indefinite detention raises serious constitutional questions in the case of aliens who have been admitted to the United States, '[a]liens who have not yet gained initial admission to this country would present a very different question.'" Xi, 298 F.3d at 840 (Rymer, J., dissenting) (quoting Zadvydas, 533 U.S. at 682). As does the Xi dissent, we reject the argument that

Zadvydas leaves us little choice but to apply § 1231(a)(6) uniformly to all aliens. See Xi, 298 F.3d at 841 (Rymer, J., dissenting). As aptly stated by Judge Rymer, "[w]e do have a choice because the Court's interpretation was discrete as to *admitted* aliens" and "[i]t was driven by the need to avoid constitutional problems that pertain to those who are admitted – but that do not pertain to those who are *not* admitted." Id. We further agree with Judge Rymer that "[t]he result is a nuanced interpretation of § 1231(a)(6) that keeps it from being applied unconstitutionally but otherwise leaves it alone. When a statute has different applications, it is not necessary to say that it is categorically infirm; it is only the constitutionally problematic aspects which are subject to the construction that avoids the problem." Id.

Third, Zadvydas emphasizes: "Nor do the cases before us require us to consider the political branches' authority to control entry into the United States. Hence we leave no 'unprotected spot in the Nation's armor.'" Zadvydas, 533 U.S. at 695-96 (citation omitted). The ability to exclude aliens from this country at its borders is a duty entrusted to the Executive Branch so that it may protect the citizens and residents of this country from all manner of nameless dangers. Creating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country's defense of its borders. For example, it may be the case that the government will not be able to determine what potential dangers a

particular unadmitted alien might pose. In such a situation, the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained. Removing this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks.

Moreover, in the instant case, the government already has determined that Benitez poses a danger to the community and is likely to engage in further violent behavior, and therefore is a security threat. Benitez engaged in serious criminal conduct while paroled into this country. Even after his parole was revoked based on his criminal convictions, the INS again issued a Notice of Releaseability, but later revoked that Notice based on its determination that Benitez still refused to conform his conduct to the laws of this nation. In light of Benitez's criminal history, requiring Benitez's release after six months' detention does, in fact, create the very "unprotected spot in the Nation's armor" that the Supreme Court sought to avoid in Zadvydas. See Xi, 298 F.3d at 842 (Rymer, J., dissenting). We decline to read § 1231(a)(6) so as to deprive the Executive Branch of this authority absent an express statement from the Supreme Court to the contrary.

Fourth, ideally Benitez should be returned as soon as possible to his own country. However, this cannot happen if his own country will not allow it. Congress has given the Attorney General the discretion to detain or parole persons

who are not admitted into this country and whose own country will not take them back. In light of the fact that the Supreme Court in Zadvydas went to such great lengths to distinguish inadmissible aliens, we shall not fetter that discretion by presumptively requiring their release into this country after six months. As stated by Judge Rymer, "Congress did not prescribe it, nor does a serious constitutional doubt compel it, and we have no call to construe § 1231(a)(6) to contain this limitation for inadmissible aliens." Xi, 298 F. 3d at 843 (Rymer, J., dissenting).

Fifth and finally, reading § 1231(a)(6) as creating a right to parole into this country after six months for inadmissible aliens is undoubtedly a drastic expansion of the rights of inadmissible aliens, who have never gained entry into this country. It is without question that Congress had a contrary intention when enacting IIRIRA: it sought to tighten immigration regulations. As the very language of IIRIRA mandates, courts are not to construe IIRIRA to "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. § 1231(h). It is also clear that Congress intended the use of the term "inadmissibility" to subject removable aliens to the same potential for indefinite detention – if they could not be removed after the commission of a serious crime – to which excludable aliens had been subject both statutorily and constitutionally for years. See, e.g., S. Rep. 104-249, 1996 WL 180026 at *7 ("The opportunity that U.S. immigration law

extends to aliens to enter and remain in this country is a privilege, not an entitlement.").

Inadmissible aliens such as Benitez never truly have resided in this country free from restraint. Rather, Congress has bestowed on them the luxury of parole while their immigration applications and status are finalized. To pervert this gift from Congress into a right after six months not only would distort Congress's intent and potentially create grave security concerns for the people of the United States, but also would create needless difficulties in how the INS processes aliens. Because Zadvydas's holding is qualified in so many regards, and there is no need to construe § 1231(a)(6) to avoid constitutional due process concerns for inadmissible aliens, the government has the authority under § 1231(a)(6) to detain inadmissable aliens indefinitely and Zadvydas's six-month presumption of reasonableness is inapplicable to inadmissible aliens.

III. CONCLUSION

For all the above reasons, we affirm the district court's denial of Benitez's § 2241 petition.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner.

vs.

ROBERT A. WALLIS,
DISTRICT DIRECTOR, I.N.S,

Respondent.

_____/

CASE NO. 5:02cv19 MMP

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ORDER

This matter is before the Court on the Report and Recommendation of the Magistrate Judge, which recommends denying Mr. Benitez' petition for writ of habeas corpus. For the reasons which follow, the Report and Recommendation is adopted.

Mr. Benitez attempted to gain access to the United States from Cuba illegally but was detained by the Immigration and Naturalization Service (INS) and eventually paroled into the country. He has not improved his status in the United States beyond that of a non-admitted parolee since that date.

In 1993, Mr. Benitez was convicted in a Florida state court of various crimes relating to armed robbery and sentenced to 20 years in prison. Also, his parole into the country was revoked by an INS panel and removal proceedings were commenced against him. When he was released from state custody, he was placed directly into INS custody. He remains in INS custody pending completion of removal proceedings

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against him.

When an alien has been found to be unlawfully present in the United States and a final order of removal has been entered, the Government ordinarily secures the alien's removal during a subsequent 90-day statutory "removal period," during which time the alien normally is held in custody.

Moreover, Title 8 U.S.C. §§ 1231(a)(6) authorizes further detention if the Government fails to remove the alien during those 90 days. It says:

> An alien ordered removed [1] who is inadmissible ... [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.

Based on this statute, the petitioner has been detained in INS custody since the completion of his state term of incarceration, pending his removal back to his Cuban homeland. The problem is that Cuba has declined to fully implement the repatriation treaty with the United States, and there is no indication that petitioner can be returned to Cuba in the foreseeable future. The petitioner claims that he is therefore being detained indefinitely and that such detention violates rights that he has under the United States Constitution.

The petitioner relies greatly on Zadvydas v. Davis, 121 S.Ct. 2491 (2001), which held that the above statute, applied to resident aliens, contained an implicit "reasonable time" limitation. Thus, resident aliens could not be indefinitely detained, and a post-

removal-period detention of six months or less was deemed presumptively reasonable. Petitioner claims, therefore, that he must either be removed or released after six months detention.

The flaw in petitioner's argument, however, is that he is not a "resident alien," as the petitioners were in Zadvydas. Instead, he is a non-admitted parolee, and, as Zadvydas itself explained, that distinction makes a crucial difference. In Zadvydas, Justice Breyer explicitly discussed this distinction:

> The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953), as support. That case involved a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him. The Court held that Mezei's detention did not violate the Constitution. Id., at 215-216, 73 S.Ct. 625.
>
> Although Mezei, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. As the Court emphasized, the alien's extended departure from the United States required him to seek entry into this country once again. His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border." Id., at 213, 215, 73 S.Ct. 625. And that made all the difference.
>
> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. See Kaplan v. Tod, 267 U.S. 228, 230, 45 S.Ct. 257, 69 L.Ed. 585 (1925) (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"); Leng May Ma v. Barber, 357 U.S. 185, 188-190, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958) (alien "paroled" into the United States pending admissibility had not effected an "entry"). It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. See United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries); Johnson v. Eisentrager, 339 U.S. 763, 784, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (same). But once an alien enters the country, the legal circumstance

changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-598, and n. 5, 73 S.Ct. 472, 97 L.Ed. 576 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); cf. Mezei, supra, at 212, 73 S.Ct. 625 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, see Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896), though the nature of that protection may vary depending upon status and circumstance, see Landon v. Plasencia, 459 U.S. 21, 32-34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982); Johnson, supra, at 770, 70 S.Ct. 936.

Zadvydas 121 S.Ct. at 2500-01.

Under the cases cited by Justice Breyer, Mr. Benitez's parole into the United States did not count as an "entry" into the United States. Therefore, Mr. Benitez does not enjoy the full panoply of Constitutional rights which accrue to a person who is deemed to have entered the United States. The result, as the Magistrate Judge correctly points out, is that this court's jurisdiction is limited to determining "whether there exists a facially legitimate and bona fide reason for the government's decision...." Jean v. Nelson, 727 F.2d 957, 978 (11th Cir.1984). Here, the INS determined that Mr. Benitez was removable because he posed a danger to the community and was likely to engage in further violent behavior. These are facially legitimate and bona fide

reasons to attempt to remove him, and also to detain him until removal is possible. Accordingly, this Court has no jurisdiction to second-guess the decisions of INS on these issues, and it is hereby

ORDERED AND ADJUDGED:

1. The Report and Recommendation of the Magistrate Judge (doc. 7) is adopted and incorporated herein.

2. The petition for writ of habeas corpus is DENIED, and the clerk is directed to close the file.

DONE AND ORDERED this 11TH day of June, 2002.

Maurice M. Paul

Maurice M. Paul, Senior District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,
Petitioner,

vs.

ROBERT A. WALLIS
Respondent,

5:02cv19/MMP/MD

/

REPORT AND RECOMMENDATION

This matter is before the court upon a petition for writ of habeas corpus (doc. 1) filed pursuant to 28 U.S.C. § 2241. The respondents filed an answer (doc. 5), and petitioner filed a response (doc. 6).

Petitioner is an alien citizen of Cuba who entered this country in 1980. He contends that upon his release from the Florida Department of Corrections in July of 2001 after having served his sentence for armed robbery and armed burglary, he was re-arrested by officials from the Immigration and Naturalization Service ("INS"), and has been detained ever since. Petitioner asserts that mandatory, indefinite detention is unconstitutional and that he is entitled to release based on *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). In *Zadvydas*, the Supreme Court held that after a six month period of detention, if an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing in order to justify continued detention. 121 S.Ct. at 2505. The court also held that an alien may be confined until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future. *Id.*

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According to the respondent, petitioner attempted entry into the United States on or about June 26, 1980. Aliens such as the petitioner who are Cuban and who attempted entry between April 15, 1980 and October 20, 1980 are known as "Mariel Cubans" because their departures from Cuba were generally part of the "Mariel Boatlift." Petitioner was paroled into the United States on or about July 3, 1980, but has never adjusted his status to that of lawful permanent resident.

Petitioner was convicted of grand theft on June 20, 1983 and received a three year term of probation (doc. 5, exh. B). Petitioner applied to adjust his immigration status to that of permanent resident, but the application was denied because his criminal conviction made him excludable under section 212(a)(9) of the Immigration and Nationality Act (doc. 5, exh. C). A second application was denied for lack of prosecution in March of 1990 (doc. 5, exh. D). On April 5, 1993 petitioner was sentenced to a twenty year term of imprisonment after being convicted of armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery and unlawful possession, sale or delivery of a firearm with altered or removed serial number (doc. 5, exh. E). By letter dated June 1, 1993, petitioner was advised that his parole was revoked and that he would be taken into custody of the INS pending exclusion proceedings (doc. 5, exh. F & G). On the same date the INS issued a notice to appear in which it charged that petitioner was subject to removal from the United States because: (1) he was an alien who had been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more, § 212(a)(2)(B) of the INA, 8 U.S.C. § 1182(a)(2)(B); and (2) he was an intending immigrant not in possession of valid travel documents, § 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I) (doc. 5, exh. G). On December 12, 1994, petitioner was found to be subject to exclusion pursuant to both of the cited provisions (doc. 5, exh. H). He waived his right to appeal this decision (*Id.*).

On October 11, 2001, petitioner was notified that on November 6, 2001 his status would be reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody (doc. 5, exh. I). The instant petition challenging the petitioner's continued custody by the INS was filed on January 1, 2002 and

received by the court on January 11, 2002. On January 17, 2002, petitioner was served with a Notice of Releasability by the Cuban Review Plan in which petitioner was advised that a panel had determined that he was releasable under the criteria established in the Plan (doc. 5, exh. J). He was further advised that he would not be released from custody until a suitable sponsorship or placement had been arranged for him. Finally, he was informed that his release from custody would be conditioned upon his continuing to maintain proper behavior while the search for sponsorship was underway, and that failure to do so could result in continued confinement.

Through the instant § 2241 petition, petitioner challenges the INS's custody over him and seeks release from detention. Respondent acknowledges the jurisdiction of the court, but states that the INS's continued custody over an inadmissible alien such as the petitioner is lawful and must be upheld, notwithstanding the finding of the Cuban Review Plan that he is releasable.

Petitioner does not rebut respondent's contention that he entered the United States as a parolee[1] conditioned on a bond that was ultimately revoked, and that he has never successfully adjusted his immigration status to that of a lawful resident alien. Thus, petitioner's current position under the law is that of an alien seeking admission into the United States. Title 8 U.S.C. § 1182(d)(5)(A)[2]; *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1075, 2 L.Ed.2d 1246 (1958) ("[the parole of aliens seeking admission to the United States] was never intended to affect an alien's status"); *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) ("an alien's legal status is not altered by detention or parole under the entry doctrine fiction."); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir.

[1]Petitioner's boilerplate responsive memorandum argues, unpersuasively and contrary to established law, that Mariel Cubans should not be classified as aliens who have been "stopped at the border."

[2]Title 8 U.S.C. § 1182(d)(5)(A) provides in pertinent part that the "Attorney General may . . . in his discretion parole into the United States temporarily . . . any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

1991). Aliens seeking admission have neither a constitutional right to be admitted into this country, *Fernandez Roque v. Smith*, 734 F.2d 576, 583 (11th Cir. 1983) (citing *Landon v. Plasenci*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21, 32 (1982); *Bridges v. Wixon*, 326 U.S. 135, 151, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103, 2119 (1945)), nor any constitutional rights with regard to their applications for admission. *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984); see also *United States v. Rodriguez-Fernandez*, 234 F.3d 498, 501 n.7 (11th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338, 1346 (11th Cir. 2000). And denial, or in this case revocation, of parole does not rise to the level of a constitutional infringement. *Fernandez-Roque*, 734 F.2d at 582; *Jean*, 727 F.2d at 972.

Title 8 U.S.C. §1231 governs detention and removal of aliens ordered removed. Section 1231(a)(1)(A) provides that once an alien is ordered removed the Attorney General shall remove the alien within a period of 90 days. During the removal period, the Attorney General is to detain the alien. Title 8 U.S.C. § 1231(a)(2) specifically provides that "[u]nder no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2)[3] or 1182(a)(3)(B)[4] of this title or deportable under section 1227(a)(2)[5] or 1227(a)(4)(B)[6] of this title." In spite of the finding of the panel under the Cuban Review Plan that petitioner is releasable, petitioner clearly could be classified as either inadmissible or deportable due to his criminal history, and would thus be subject to mandatory detention.

The Supreme Court's decision in *Zadvydas* limited the application of § 1231, holding that this statute does not authorize indefinite detention of aliens admitted to the United States. However, the individuals whose cases were before the *Zadvydas* court were aliens

[3]This section provides that aliens convicted of certain crimes, including crimes involving moral turpitude, are inadmissible.

[4]This section provides that aliens whose admission raises security issues due to an intent to spy, sabotage or engage in terrorist activities, among other things, are inadmissible.

[5]This section provides that aliens convicted of certain crimes, including crimes for which a sentence of one year or longer may be imposed and crimes involving moral turpitude, are deportable.

[6]This section provides that aliens whose presence raises security issues due to an intent to or history of engaging in espionage, sabotage, or terrorist activities, among other things, are deportable.

who were lawful permanent residents. For that reason, petitioner's reliance on *Zadvydas* as authority supporting his release is mistaken. The *Zadvydas* Court specifically differentiated between the situation of an alien who has effected entry into the United States, such as the petitioners in that case, and one, such as the instant petitioner, who has not. 121 S.Ct. at 2500. In particular, the Court distinguished and recognized the continued validity of *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). In *Mezei* it had found no constitutional infringement in the case of a lawfully admitted alien who left the United States, returned, was refused admission, and was left indefinitely detained on Ellis Island because the government could not find another country to accept him.

Zadvydas has undoubtedly affected the status of many INS detainees, including those identified by the petitioner in his reply memorandum. However, neither this case, nor any other provides relief for the Cuban petitioner, in light of his status as an excludable alien, despite the fact that there is no reasonable likelihood that he will be deported to his home country in the foreseeable future. And, because the record reflects a facially legitimate purpose for the petitioner's continued detention, that his release must be conditioned upon the arrangement of a suitable sponsorship or placement, it is lawful. See 8 C.F.R. § 212.12(f).

Based on the foregoing, it is respectfully RECOMMENDED:

The petition for writ of habeas corpus (doc. 1) be DENIED.

At Pensacola, Florida, this 8th day of April, 2002.

Miles Davis

MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon all other parties. Failure to object may limit the scope of appellate review of factual findings. See 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).